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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE 942, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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International Association of Machinists, Lodge 942, AFL-CIO, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on March 10, 1959.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 263 F. 2d 796 (*infra*, pp. 1a-7a). Its further

opinion rendered in connection with its partial denial of petitioner's motion to stay the judgment pending application for certiorari is not yet reported (*infra*, pp. 8a-9a). The decision and order of the Board, Member Murdock dissenting, are reported at 119 NLRB 307 (R. 18-53).

JURISDICTION

The judgment of the Court of Appeals was entered on March 10, 1959 (*infra*, pp. 10a-13a). A petition for rehearing, filed on February 20, 1959, was denied on February 26, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Section 8(b)(1)(A) of the National Labor Relations Act prohibits peaceful picketing by a union to secure its recognition as the employees' exclusive barganing representative at a time when the union does not represent a majority of the employees within the appropriate unit.

2. Whether a Court of Appeals is required *sua sponte* to decline to review the merits of a question because of the absence of exceptions to the trial examiner's intermediate report where (1) the National Labor Relations Board disregarded the absence of exceptions and affirmatively considered and decided the question on its merits, (2) the question is one of law pertaining to whether the Board has acted in excess of its statutory authority, and (3) no party to the proceeding before the Court of Appeals interposed any objection to judicial review of the merits of the question.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), are set forth in the statement.

STATEMENT

The Board found that petitioner engaged in three forms of activity: (1) For nearly a year from August 16, 1955 to July 13, 1956, except for a four to six week interval during the winter of 1955-1956, petitioner peacefully picketed the premises of Alloy Manufacturing Company. The picketing was carried on by a single person. The picket sign originally read "This firm is Nonunion" and was later changed to read "Nonunion employees unfair." (R. 39; 70, 73-75, 106-107, 108.) (2) On June 20, 1955, petitioner wrote to the Spokane Central Labor Council requesting that Alloy be placed on the Council's "We Do Not Patronize" list. On July 27, the Council placed Alloy on the list. The list is published in the "Labor World," the official periodic publication of the Council. (R. 37, 38; 58, 71, 76, 115-116, 122-123.) (3) Petitioner asked several of Alloy's customers not to patronize Alloy (R. 21, 39-40; 79-82).

The Board found that petitioner carried on this three-faceted activity for the purpose of inducing Alloy (1) to recognize petitioner as the exclusive representative of its employees, and (2) to enter into a union shop agreement with it (R. 19, 20, 23-24, 52). The Board also found that petitioner did not represent a majority of Alloy's employees (*ibid.*). The Board concluded, based on its finding that petitioner sought exclusive recognition when it had no majority, that by each of the three separate facets of its activity—

the picketing, the "We Do Not Patronize" list, and the customer appeals — petitioner violated Section 8(b)(1)(A) of the Act (R. 19, 23-24). Section 8(b)(1)(A) provides that it shall be an unfair labor practice for a labor organization or its agents "to restrain or coerce employees (A) in the exercise of the rights guaranteed in section 7. . . ." Section 7 provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

The Board further concluded, based on its finding that petitioner sought a union shop agreement when it had no majority, that by each of the three separate facets of its activity petitioner independently violated Section 8(b)(2) and (1)(A) of the Act (R. 19-20, 52). Section 8(b)(2) provides that it shall be an unfair labor practice for a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3). . . ." Section 8(a)(3) makes it an unfair labor practice for an employer to encourage or discourage membership in a labor organization by discrimination in employment, and *inter alia* excepts a union shop agreement from its scope if the "labor organization is the representative of the employees as

provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made. . . ."

Upon the Board's petition to enforce its order, the Court of Appeals disposed of the case on the following basis:

(1) In the court below petitioner agreed that a demand for a union shop agreement, backed by picketing to support it, when a union does not represent a majority, is a violation of Section 8(b)(2) of the Act. Petitioner also agreed that the Board's findings to this effect were supported by substantial evidence, and petitioner therefore acquiesced in the entry of a decree to enforce that part of the Board's order based on the finding of a violation of Section 8(b)(2) by picketing. In reliance upon this concession, the court below enforced the Board's order in this respect (*infra*, p. 3a-4a). And since the conduct was thus effectively prohibited through the medium of Section 8(b)(2), the court found it unnecessary to determine whether the conduct independently violated Section 8(b)(1)(A) (*infra*, pp. 4a, 5a).

(2) With respect to the customer appeals and the "We Do Not Patronize" list, the court below found "the conduct of Union of listing and persuasion, excepting picketing, to be within the general area of protection of the 1st amendment guarantying freedom of speech" (*infra*, p. 7a). It therefore set aside the Board's order "in so far as it prohibits listing of Alloy on the 'We Do Not Patronize' list and the importuning of customers not to patronize Alloy" (*infra*, p. 7a).

(3) As to petitioner's picketing for recognition, the court below found that the question whether "picketing for the purpose of achieving designation of it as the exclusive bargaining agent violated section 8(b)(1)(A) cannot be entertained by us because Union took no exception to that finding of the examiner—indeed it filed no objections to the report of the examiner at all" (*infra*, p. 4a). The court was of the view that it was therefore precluded by Section 10(e) from considering the merits of the question. Section 10(e) provides in pertinent part that: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." The court concluded that "Union having failed to make any objection to the finding by the examiner and a recommendation that it be restrained from picketing to enforce exclusive recognition leaves us no other choice than to sustain the order of the Board as far as it respects picketing" (*infra*, p. 5a).

Petitioner filed a petition for rehearing in which it took the position that Section 10(e) had no applicability. The petition pointed out that: (1) the Board disregarded the absence of exceptions and affirmatively considered and decided the merits of the question; (2) the question is one of law and pertains to whether the Board has acted in excess of its statutory authority; and (3) the Board interposed no objection before the court to judicial review of the merits of the question, the court having raised the issue *sua sponte*. The court denied the petition for rehearing.

REASONS FOR GRANTING THE WRIT

1. The decree of the court below requires *inter alia* that petitioner shall cease and desist from "Restraining or coercing employees of Alloy Manufacturing Company in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, as amended, . . . by picketing for the purpose of obtaining recognition of Alloy's employees at a time when it does not represent a majority of them" (*infra*, pp. 10a-11a). This prohibition is based on the Board's conclusion that petitioner "violated Section 8(b)(1)(A) by picketing Alloy for exclusive recognition when it represented no more than a minority of employees" (R. 19). The Board supported its conclusion on the authority of its contemporaneous decision in *Curtis Brothers, Inc.*, 119 NLRB 232 (*ibid.*). The Court of Appeals for the District of Columbia Circuit set aside the Board's order in *Curtis Brothers*, *sub nom. Drivers Local Union No. 639* v. *National Labor Relations Board*, 43 LRRM 2156 (November 26, 1958), holding that "§ 8(b)(1)(A) is inapplicable to peaceful picketing, whether 'organizational' or 'recognitional' in nature . . ." (*id.* at 2157). The decree in this case thus prohibits conduct which the Court of Appeals for the District of Columbia Circuit states is outside the statutory scope of Section 8(b)(1)(A). The Board on February 20, 1959, filed a petition for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit. *National Labor Relations Board* v. *Drivers Local Union No. 639*, No. 717, October Term 1958. This Court granted the petition on April 20, 1959.

2. The court below declined to reach the merits of the question whether peaceful picketing to obtain the

recognition of a union as the exclusive bargaining representative at a time when it does not have a majority constitutes a violation of Section 8(b)(1)(A) of the Act. It held that, in the absence of exceptions by petitioner to the trial examiner's intermediate report, the merits of the question "cannot be entertained by us" (*infra*, p. 4a) and "leaves us no other choice than to sustain the order of the Board as far as it respects picketing" (*infra*, p. 5a). This holding presents an important question of appellate practice in the judicial review of agency determinations which the court below has decided in conflict with the principles enunciated in applicable decisions of this Court.

(a) Section 10(e) of the Act provides that: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Section 10(e) has no application in this case. For the short of the matter is that the Board did not rely upon the lack of exceptions but considered and decided the question on its merits.

The Board's current interpretation of Section 8(b)(1)(A) was enunciated in three companion cases: this case, *Curtis Brothers*, 119 NLRB 222, and *Shepherd Machinery Co.*, 119 NLRB 320. The Board issued *Curtis Brothers* on October 30, 1957, and four days later, on November 4, 1957, it issued this case and *Shepherd*.

The Board in its decision in this case stated that (R. 19):

> The Trial Examiner found that by its conduct in picketing the premises of the Alloy Manufac-

turing Company with an object of obtaining exclusive recognition at a time when it did not represent a majority of Alloy's employees, the Respondent Union violated Section 8(b)(1)(A) of the Statute. No exceptions have been filed to this conclusion. The Trial Examiner's findings of fact, preliminary to his conclusion of law, are amply supported by the record. Moreover, his conclusion comports with our decision in *Curtis Brothers,* 119 NLRB No. 33. Accordingly, we find, as did the Trial Examiner, that the Respondent violated Section 8(b)(1)(A) by picketing Alloy for exclusive recognition when it represented no more than a minority of employees.[2]

[2] Member Jenkins who concurred specially in the *Curtis* decision limited his concurrence therein to the unlawful picketing after a decertification election—which he believed to be the issue raised by the complaint in *Curtis*. As the complaint in the instant case is broader in that it covers all picketing for an illegal objective regardless of whether there has been an election, he therefore subscribes fully to the opinion herein.

Thus the Board did not state that it was adopting the examiner's conclusion in the absence of exceptions to it; rather it stated that it was independently finding as he did on the authority of its own contemporaneous decision in *Curtis.* Furthermore, the Board utilized this case to extend the theory it had adopted in *Curtis.* Based on the view that minority picketing for recognition violates Section 8(b)(1)(A), the Board in this case concluded that minority picketing for a union shop agreement also violates Section 8(b)(1)(A), for the "same underlying considerations explicated in the *Curtis Brothers* decision leading to the conclusion that picketing for exclusive recognition restrains and coerces within the meaning of Section 8(b)(1)(A), apply with equal force to picketing by a minority

union for purposes of obtaining a union shop agreement" (R. 20). The Board then took a further step. Finding that the customer appeals and the "We Do Not Patronize" list were also employed to secure recognition, the Board stated that "for the same reasons that we have found the picketing in *Curtis Brothers* and here to be in violation of Section 8(b)(1)(A), we find that the customer appeals and the publication of the 'We Do Not Patronize' list also violated that section of the Act" (R. 23-24).

Member Murdock in dissent noted that the absence of exceptions was a means of disposing of the issues without reaching the merits and remonstrated the majority for not following that course (R. 27-28):

> Inasmuch as no exceptions were filed to the Trial Examiner's findings with respect to the 8(b)(2) and 8(b)(1)(A) violation or to his failure to find an 8(b)(1)(A) violation on the basis of picketing for a union shop, I see no reason to pass upon these issues. However, as the majority's 8(b)(1)(A) findings are based upon the theory of coercion adopted in the *Curtis* case, that peaceful picketing for recognition by a union constitutes coercion under Section 8(b)(1)(A), I do not agree with the rationale of the findings.

And, while the Board denied the request for oral argument in this case (R. 18, n. 1), the Board heard oral argument in *Curtis* and in *Shepherd* simultaneously (119 NLRB 232, n. 1, 239, n. 11, 320, n. 1), and it issued its decision in *Shepherd* and in this case on the same day, giving this case the earlier number and disposing of an issue in *Shepherd* by citation of this case (119 NLRB 320, n. 2).

It is thus patent that the Board deliberately disregarded the absence of exceptions and instead chose to utilize this case and *Curtis* as its vehicles for the full expression of its pioneer interpretation of Section 8(b)(1)(A). It is not unusual for the Board to consider the merits of a matter although no exceptions are directed to it. Under its rules, although it need not, it may consider a particular issue to which no exception is taken if the case is before it on any exceptions.[1] It not infrequently does so.[2] It did so here designedly and with full foreknowledge.

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[1] Section 102.48(a) of the Board's rules provides that:

> In the event *no* statement of exceptions is filed as herein provided, the findings, conclusions, and recommendations of the trial examiner as contained in his intermediate report and recommended order *shall* be adopted by the Board and become its findings, conclusions, and order, and *all* objections and exceptions thereto *shall be deemed waived* for *all* purposes [emphasis supplied].

On the other hand Section 102.48(b) provides that:

> Upon the filing of a statement of exceptions and briefs, as provided in section 102.46, the Board *may* decide the matter forthwith upon the record, or after oral argument, or *may* reopen the record and receive further evidence before a member of the Board or other Board agent or agency, or *may* close the case upon compliance with recommendations of the inter-

(*Footnote One Continued on Page 12*)

[2] *E.g., International Brotherhood of Teamsters, Local 179*, 110 NLRB 287, 288; *Utah Construction Co.*, 95 NLRB 196, 211, n. 38; *General Shoe Corp.*, 90 NLRB 1330, 1333, n. 12; *International Rice Milling Co., Inc.*, 84 NLRB 360 (wherein the Board dismissed a complaint although no exceptions were taken to the examiner's findings of violations and the only exceptions taken were by proponents of the complaint who contended that the examiner had not gone far enough. For a further history of this case see 183 F. 2d 21 (C.A. 5), reversed in part, 341 U.S. 665).

In these circumstances there is no room for the application of Section 10(e). Section 10(e) expresses "the salutary policy . . . of affording the Board opportunity to consider on the merits questions to be urged upon review of its order." *Marshall Field and Co. v. National Labor Relations Board*, 318 U.S. 253, 256; *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 389. When the Board, despite the absence of exceptions, does consider on the merits the question thereafter urged on review, the reason for the rule disappears. The Board cannot claim either that it was deprived of an administrative "opportunity for correction" (*United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33, 37), or that it was

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(*Footnote One Continued From Page 11*)

> mediate report, *or may make other disposition of the case* [emphasis supplied].

Section 101.12(a) of the Board's Statements of Procedure explains in part that:

> If *any* party files exceptions to the intermediate report, the Board, with the assistance of the legal assistants to each Board member who function in much the same manner as law clerks do for judges, *reviews the entire record*, including the trial examiner's report and recommendations, the exceptions thereto, the complete transcript of evidence, and the exhibits, briefs, and arguments. * * * It then issues its decision and order in which it may adopt, modify, or reject the findings and recommendations of the trial examiner [emphasis supplied].

On the other hand Section 101.12(b) explains that:

> If *no* exceptions are filed to the intermediate report and the respondent does not comply with its recommendations, the Board adopts the report and recommendations of the trial examiner. All objections and exceptions, whether or not previously made during or after the hearing, are deemed waived for all purposes [emphasis supplied].

not "put. . . . on notice of the issue now presented" (*May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 386, n. 5). The Board deliberately sought out the issue and considered its merits as fully as it would have had specific exception been taken. To apply Section 10(e) nonetheless would be an anachronistic exaltation of form.

Accordingly, as the Court of Appeals for the Second Circuit said of Section 24(a) of the Public Utility Holding Company Act,[3] a provision like Section 10(e), "It seems not inappropriate for us to consider the lack of objection here as excused because of the Commission's own actions in examining the issue involved and to decide the case upon the merits. . . ." *Phillips* v. *S. E. C.*, 156 F. 2d 606, 608. And as the Court of Appeals for the District of Columbia Circuit has similarly stated, "Section 19(b) of the Natural Gas Act limits our consideration to those points which have been urged before the Commission in an application for rehearing. The plain purpose of that provision of the statute is to give the Commission an opportunity to rule upon any matter which is to be relied upon on review. The Commission is thus placed in the position of framing the issues we shall hear. By waiving a procedural irregularity and deciding the underlying substantive issue, the Commission places that substantive issue before us for review." *City of Pittsburgh* v. *F. P. C.*, 237 F.2d 741, 749. So here, by disregarding the absence of exceptions and deciding the merits of the underlying substantive issue, the Board places that

[3] "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure to do so."

substantive issue before the court for review. The Board has not, at least so far, contended otherwise (*infra*, pp. 15-16).

(b) There is an inherent limitation upon the applicability of Section 10(e) which is pertinent here. The absence of objection does not foreclose judicial inquiry to determine whether the Board has "traveled outside the orbit of its authority. . . .". *N. L. R. B.* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388 The issue in this case is squarely within this reservation. It presents the naked question of law whether the Board acts in excess of its statutory authority when it requires the cessation of picketing to secure the recognition of a union which does not have majority status. To the solution of this question agency expertness does not contribute. Even if it did, the Board has expressed its full thoughts on the subject. And this is not the distinct situation where the power of the agency to lay its hand upon the subject is admitted and the only question is whether the circumstances exist which render exertion of the power permissible. If the Court of Appeals for the District of Columbia Circuit is correct in its view of the reach of Section 8(b)(1)(A) the decree of the court below would prohibit petitioner from engaging in conduct which is allowable to all others under the law of the land.[4]

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[4] The extent of the deprivation is apparent from the opinion of the court below rendered in connection with its partial denial of a motion to stay pending application for certiorari. In the motion for the stay petitioner explained that no picketing was currently in progress at the employer's premises, and that, "Should picketing of Alloy's premises be resumed, its purpose will be confined to (1) persuading the employees of Alloy to join . . . [petitioner], and/or (2) persuading customers of Alloy not to patronize it. No picketing for the purpose of securing . . . [petitioner's] recognition as the employees' exclusive bargaining representative will take place unless and until a majority of Alloy's employees desig-

(c) Neither in its statement of points (R. 139), its brief, or on oral argument in the court below did the Board suggest that Section 10(e) applied to preclude consideration of the merits of the naked question of law presented. On the contrary, the Board in its brief below carefully differentiated between (1) the question of the substantiality of the evidence to support the findings of fact and (2) the question of law presented based upon acceptance of the findings. As to the findings of fact only did the Board urge that in the absence of exceptions these "are not subject to contest before this Court" (Bd. br. p. 13).[5] Upon the

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nate the . . . [petitioner] as their representative" (R. 160). In its opinion denying the stay, the court below quoted the first sentence, but not the second, and then stated, "The Board suggests, and we agree, that to subject Alloy and its employees to this kind of pressure to select an unwanted representative would, if the Board's view be ultimately sustained, result in a pro tanto impairment of the Act's policies" (*infra*, p. 9a). The Board made no suggestion in its opposition to the stay that picketing for the purposes described in the motion would violate the decree or the Act (R. 166-167). Such a suggestion would have been inconsistent with its express reservation of the question whether organizational picketing, as distinct from recognitional picketing, violated Section 8(b)(1)(A) of the Act (*Curtis Brothers, Inc.*, 119 NLRB 232, 239, enforcement denied, *sub nom. Drivers Local Union No. 639* v. *National Labor Relations Board*, 43 LRRM 2156 (C.A.D.C.), certiorari granted, April 20, 1959, No. 717, October Term, 1958). This reservation had been expressly noted by the Board in its opening brief in the court below (p. 28, n. 15). The picketing which the decree enjoins is recognition picketing. Petitioner's motion to stay explicitly disclaimed any intention to engage in recognition picketing and specifically stated any picketing would be confined to persuading employees to join and/or persuading customers not to patronize a non-union firm. Yet the court below slid from a decree enjoining recognition picketing to an apparent view that the decree enjoined organizational and consumer picketing.

[5] We have requested the Clerk of the Court of Appeals for the Ninth Circuit to lodge ten certified copies of the Board's brief in the court below with the Clerk of this Court.

question of law the Board in its brief addressed itself entirely to the merits and at no point intimated that the merits were not properly before the court below (Bd. br. pp. 15-41). Since petitioner did not contest the findings of fact, and since the applicability of Section 10(e) to the question of law had not been put in issue by the Board, petitioner did not treat with it in the court below until it filed its petition for rehearing *after* the court had raised the question *sua sponte*. The court thus of its own motion based decision on a point which, if available to the Board at all, had been waived by it. And since Section 10(e) is not "a limitation on jurisdiction" but rather "a mandate to be observed by the reviewing court in the exercise of its admitted jurisdiction" (*Phillips* v. *S. E. C.*, 156 F. 2d 606, 608 (C. A. 2), cf. *Smith* v. *Apple*, 264 U.S. 274, 277-280), the court below was not obliged to animate an issue which had not been tendered. As a matter of judicial administration it would seem to be at least as salutary for a court not to consider an issue not urged before it as to decline to consider the merits of a naked question of law because of the absence of exceptions before the agency.[6]

(d) Section 10(e) is not so exigent as to require or permit the court below *sua sponte* to decline to reach the merits of a naked question of law which the Board did affirmatively consider and decide and which goes to the Board's statutory authority. As this Court stated in *Hormel* v. *Helvering*, 312 U.S. 552, in holding that a Court of Appeals "should have given and properly did give consideration" to a point not presented to or considered by the Board of Tax Appeals (*id.* at

[6] See *Ladner* v. *United States*, 358 U.S. 169, 172-173; *United States* v. *Spector*, 343 U.S. 169, 172.

559), as ingrained a part of the rule that "Ordinarily an appellate court does not give consideration to issues not raised below" (*id.* at 556) is the qualification "that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice" (*id.* at 558). To heed the qualification is not to disrespect the rule (*id.* at 557):

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

The *Hormel* teaching is particularly pertinent here. For here the Board *did* consider and decide the merits of the issue which the court below was asked to review, here the issue pertains to "agency action taken in excess of delegated powers" (*Leedom* v. *Kyne,* 358 U.S. 184, 190), and here no objection had been interposed to judicial review of the merits of the issue. To read Section 10(e) as nevertheless precluding judicial review is to disregard its purpose and the tradition of appellate practice of which it is a part. "The rule is not rigid but flexible; it is clearly susceptible of judicial manipulation to take account of needs of justice in special circumstances." 3 Davis, Admin. Law, § 20.06, p. 92 (1958). And the words of Section 10(e), stating that the lack of objection before the Board "shall be excused because of extraordinary circumstances," are certainly supple enough to embrace this situation.

question of law the Board in its brief addressed itself entirely to the merits and at no point intimated that the merits were not properly before the court below (Bd. br. pp. 15-41). Since petitioner did not contest the findings of fact, and since the applicability of Section 10(e) to the question of law had not been put in issue by the Board, petitioner did not treat with it in the court below until it filed its petition for rehearing *after* the court had raised the question *sua sponte*. The court thus of its own motion based decision on a point which, if available to the Board at all, had been waived by it. And since Section 10(e) is not "a limitation on jurisdiction" but rather "a mandate to be observed by the reviewing court in the exercise of its admitted jurisdiction" (*Phillips* v. *S. E. C.*, 156 F. 2d 606, 608 (C. A. 2), cf. *Smith* v. *Apple*, 264 U.S. 274, 277-280), the court below was not obliged to animate an issue which had not been tendered. As a matter of judicial administration it would seem to be at least as salutary for a court not to consider an issue not urged before it as to decline to consider the merits of a naked question of law because of the absence of exceptions before the agency.[6]

(d) Section 10(e) is not so exigent as to require or permit the court below *sua sponte* to decline to reach the merits of a naked question of law which the Board did affirmatively consider and decide and which goes to the Board's statutory authority. As this Court stated in *Hormel* v. *Helvering*, 312 U.S. 552, in holding that a Court of Appeals "should have given and properly did give consideration" to a point not presented to or considered by the Board of Tax Appeals (*id.* at

[6] See *Ladner* v. *United States*, 358 U.S. 169, 172-173; *United States* v. *Spector*, 343 U.S. 169, 172.

559), as ingrained a part of the rule that "Ordinarily an appellate court does not give consideration to issues not raised below" (*id.* at 556) is the qualification "that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice" (*id.* at 558). To heed the qualification is not to disrespect the rule (*id.* at 557):

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

The *Hormel* teaching is particularly pertinent here. For here the Board *did* consider and decide the merits of the issue which the court below was asked to review, here the issue pertains to "agency action taken in excess of delegated powers" (*Leedom* v. *Kyne*, 358 U.S. 184, 190), and here no objection had been interposed to judicial review of the merits of the issue. To read Section 10(e) as nevertheless precluding judicial review is to disregard its purpose and the tradition of appellate practice of which it is a part. "The rule is not rigid but flexible: it is clearly susceptible of judicial manipulation to take account of needs of justice in special circumstances." 3 Davis, Admin. Law, § 20.06, p. 92 (1958). And the words of Section 10(e), stating that the lack of objection before the Board "shall be excused because of extraordinary circumstances," are certainly supple enough to embrace this situation.

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

April 1959.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,814

February 4, 1959

NATIONAL LABOR RELATIONS BOARD, *Appellant*,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE 942, AFL-CIO, *Appellee*.

Petition for Enforcement of an Order of the National Labor Relations Board.

Before: BONE, ORR and BARNES, Circuit Judges.

ORR, Circuit Judge:

The National Labor Relations Board, hereafter Board, determined in a proceeding before it that respondent International Association of Machinists, Lodge 942, AFL-CIO, hereafter Union, had committed unfair labor practices in that it had attempted to illegally restrain and coerce the employees of the Alloy Manufacturing Company, hereafter Alloy, as prohibited by section 8(b)(1)(A) of the National Labor Relations Act, 61 Stat. 140 (1947), 29 U.S.C.A. § 158 (1952), and that Union had violated section 8(b)(2) of the Act by attempting to cause Alloy to discriminate against its employees in violation of section 8(a)(3).

Section 8(b)(1)(A) provides that: "It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7"; section 7 provides that: "employees shall have the right to self-organization, . . .

to bargain collectively through representatives of their own choosing . . . and shall also have the right to refrain from any or all of such activities . . .".

Section 8(b)(2) provides that: "It shall be an unfair labor practice for a labor organization or its agents . . . to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . ." and subsection (a)(3) provides that: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure . . . to encourage or discourage membership in any labor organization . . .".

The Board after entering its order petitioned this court for its enforcement.

Alloy manufactures and sells truck bodies, semi-trailers and allied products. In 1954 Union made an effort to become the bargaining agent of Alloy's employees. Pursuant to proper initiation procedure, the Board conducted an election which resulted in the rejection of Union as the bargaining agent. In the spring of 1955, Union renewed its efforts to get a collective bargaining agreement by direct approach to Alloy rather than to its employees and presented to Alloy a proposed agreement to that effect together with a demand that all employees become members of Union. Alloy refused to so agree on the ground that such an agreement could not be validly executed, absent the selection of its employees of Union as such agent. But 1 or 2 out of a total of employees ranging from 8-13 were members of Union at the times the demands were made. At no time has Union maintained that it represented a majority of the employees. In making its demand on Alloy that it designate Union as its bargaining agent it informed Alloy that: "We are doing things different this year. We are . . . going direct to the employer, and we'd like to have you sign the contract and then go tell your men that you're Union and they will be very happy to be in the Union."

Further meetings and discussions were had and Alloy continued to refuse to sign the agreement. On June 20, Union requested that Alloy be placed on the Spokane Central Labor Council's "We Do Not Patronize List" and that was subsequently done. The Union also made appeals to Alloy's customers to stop doing business with Alloy. On June 23 the company filed a petition with the Board seeking a second representation election.

On August 16, Union began picketing the plant, and continued to do so for almost a year and until proceedings were instituted with the Board. After picketing began, five employees did not report for work and were subsequently replaced.

Alloy continued to operate though on some occasions truck drivers refused to unload supplies, and some of its customers notified Alloy that their business relations with Alloy were being affected by the picketing.

The Union resisted the proposal of Alloy for an election, informing the Board that it did "not claim to represent any of (Alloy's) employees." The Board nevertheless ordered an election which was held. No votes were cast for Union; six were cast against it. In the face of this unanimous rejection, Union continued its course of conduct consisting of picketing, listing and customer appeals.

In holding that Union violated section 8(b)(1)(A), the Board found that Union had exerted economic pressure on Alloy for the purpose of forcing Alloy to recognize Union as exclusive bargaining agent notwithstanding it represented no employees of Alloy.

The Board's holding that Union violated section 8(b)(2) and (1)(A) was on the ground that its activities were engaged in for the purpose of enforcing its demand for a security agreement.

Union concedes that it violated section 8(b)(2) of the Act in that it attempted "to cause an employer to dis-

criminate against an employee in violation of subsection (a)(3)" by picketing to secure a union shop agreement when it had no majority. It asserts, however, that the facts fail to establish a violation of 8(b)(1)(A) and further maintains that the "Do Not Patronize List" and the customer appeals violated no provisions of the Act. The order of the Board is said to be too broad to the extent that it prohibits conduct not actually engaged in or threatened to be engaged in by Union.

[1]In the light of Union's concession that by its conduct it violated section 8(b)(2) it becomes unnecessary to determine whether it violated 8(b)(1)(A) in respect to the use of pickets to force acceptance of a union security agreement since Union has acquiesced in the entry of a decree enforcing the order of the Board in this respect.

The objection of Union first made in this court that the finding of the trial examiner upon which the Board based its order that picketing for the purpose of achieving designation of it as the exclusive bargaining agent violated section 8(b)(1)(A) cannot be entertained by us because Union took no exception to that finding of the examiner—indeed it filed no objections to the report of the examiner at all. It merely requested permission to make an oral argument before the Board which was denied. Section 10(e) of the Act which governs the jurisdiction of this court provides that: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such obligation shall be excused because of extraordinary circumstances." No attempt has been made to excuse the failure. Section 10(e) has been construed to require that objections must be raised at all stages so that Board process may be invoked to the full extent available. As an illustration of the necessity of taking exception, in Marshall Field & Co. v. N.L.R.B., 318 U.S. 253 (1943) the Supreme Court held that a general objection "that the

examiner had erred 'in making each and every recommendation'" did not satisfy the requirement of 10(e) emphasizing the "salutory policy of 10(e) of affording the Board opportunity to consider on the merits questions to be urged upon review of its order. (318 U.S. at 255-256)" In N.L.R.B. v. Seven-Up Bottling Co. of Miami, 344 U.S. 344 (1953) the Supreme Court held that no issue not raised as an exception to the examiners' intermediate report could be considered by the court. This court has held that "objection" as used in the statute is not limited to procedural or factual matters, but extends to all issues. N.L.R.B. v. Pappas & Co., 203 F.2d 569 (9 Cir. 1953). To the same effect is N.L.R.B. v. Giustina Bros. Lumber Co., 253 F.2d 371 (9 Cir. 1958) where an issue as to whether certain picketing violated section 8(d) of the Act was abandoned before the Board and later attempted to be raised in this court. See also the Board's regulation stating that: "No matter not included in a statement of exceptions may thereafter be urged before the Board, or in any further proceedings." 29 C.F.R. § 102.46(b) (1949).

Union having consented to a decree restraining it from picketing for a security agreement and Union having failed to make any objection to the finding by the examiner and a recommendation that it be restrained from picketing to enforce exclusive recognition leaves us no other choice than to sustain the order of the Board as far as it respects picketing. We need not consider whether there was a violation of any other sections with respect to the picketing. The order of the Board as far as it relates to the restraint of picketing by Union will be enforced.

There remains for consideration the finding of the Board that the action of Union in including Alloy in its "We Do Not Patronize" list and by urging others not to do business with Alloy exercised restraint and coerced Alloy's employees. The trial examiner had found that such activities

were not prohibited. The Board did not adopt that finding. We are required to consider this action of the Board because Alloy filed objections to the findings of the examiner on these issues.

We are not in accord with the Board's action in reversing the examiner. We think he reached the correct conclusion and are so impressed with his reasoning that we quote a portion of what he said: "When invited or urged to join a union an employee may pause to reflect upon the advantages or disadvantages inherent in his choice. Alloy's employees have considered the question and have decided that they prefer not to have representation. As in all such decisions self interest has its play. Workers sometimes, at least, join unions because they hope to gain some economic benefit and sometimes are deterred from doing so by comparable considerations. It is true that business operations employing union labor will be preferred by some customers and avoided by others solely upon the basis of that factor. This circumstance operates to benefit employees or not to depending upon the choice made in relation to the predilections of their employer's clientele. Because their employer's business may be affected by such a choice it follows that the employees themselves have an economic stake in the reaction of customers to their designation of a bargaining representative or refusal to do so. So it may well be said that the selection of a union representative is often or perhaps always made in a climate not entirely free from elements which have a coercive quality. These elements are a part of the very fabric of industrial and commercial life quite beyond the reach of any conceivable statutory remedy. I do not doubt the right of the Respondent to publicize by appropriate means the fact that Alloy's employees are not represented by a union and even to persuade others by peaceful and truthful propaganda not to patronize Alloy for that reason if the

persuasion is attempted to be accomplished by no more than the expression of 'views, argument, or opinion'."[1]

"I do not understand that publication of the 'We Do Not Patronize' list is more than the expression of an opinion, and I would place the requests of business organizations that they not patronize Alloy in the same category."

We consider the conduct of Union of listing and persuasion, excepting picketing, to be within the general area of protection of the 1st amendment guarantying freedom of speech. These aspects are more protected than picketing which although within said area, "exerts influences and produces consequences different from other modes of communication." Hughes v. Superior Court, 339 U.S. 460, 465 (1950). In order to adopt the Board's finding as to the illegality of Union's action now under consideration, we would need a clearer mandate from Congress than the general terminology of the applicable statutes. If such a mandate be given, it then would be the time to consider any constitutional questions raised.

The order of the Board is ordered enforced to the extent that it prohibits picketing and set aside in so far as it prohibits listing of Alloy on the "We Do Not Patronize" list and the importuning of customers not to patronize Alloy.

(Endorsed:) Opinion. Filed Feb. 4, 1959.

PAUL P. O'BRIEN, *Clerk*.

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[1] § 8(c) of the Act reads: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No: 15,814

ORDER

April 9, 1959

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE 942, AFL-CIO, *Respondent.*

Re: Motion to Stay Paragraphs 1(a) and 2(a) and (b) of the Decree Pending Application for Certiorari

Before: BONE, ORR and BARNES, Circuit Judges.

Respondent, International Association of Machinists, Lodge 942, AFL-CIO, has moved this Court for an order staying Paragraph 1(a) and Paragraphs 2(a) and (b) of the decree in the above entitled matter pending application for a writ of certiorari and final determination of the cause by the Supreme Court of the United States. In a formal "opposition" filed with us the National Labor Relations Board does not oppose a stay of the *notice-posting* requirement of the decree as it relates to peaceful picketing but opposes any other stay by this Court.

Paragraph 1(a) of the decree requires that respondent shall cease and desist from:

> "Restraining or coercing employees of Alloy Manufacturing Company in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, as amended, . . . by picketing for the purpose of obtaining recognition of Alloy's employees

at a time when it does not represent a majority of them."

In its motion respondent frankly avows, inter alia, that "should picketing of Alloy's premises be resumed, its purpose will be confined to (1) persuading the employees of Alloy to join respondent, and/or (2) persuading customers of Alloy not to patronize it." The sort of picketing (described in Paragraph 1(a)), as did the prior picketing, would probably inflict business loss on Alloy, which in turn might force it to accede to respondent's illegal objective.

The Board suggests, and we agree, that to subject Alloy and its employees to this kind of pressure to select an unwanted representative would, if the Board's view be ultimately sustained, result in a pro tanto impairment of the Act's policies.

It is ordered by this Court that the *portion* of that *notice* which was required by our decree to be *posted*, a copy of which is attached to the decree and which reads as follows:

> "We will not restrain or coerce the employees of Alloy Manufacturing Company, in the exercise of rights guaranteed in Section 7 of the Act, including specifically the right to refrain from engaging in any or all the activities guaranteed thereunder, by picketing for the purpose of obtaining recognition of Alloy's employees at a time when it does not represent a majority of them."

be stayed in order to permit respondent to apply for a writ of certiorari, and until final determination of the cause by the Supreme Court of the United States.

In all other respects respondent's motion is denied.

(Endorsed:) Opinion. Filed April 9, 1959.

PAUL P. O'BRIEN, *Clerk*.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,814

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE 942, AFL-CIO, *Respondent*.

Decree Enforcing, in Part and Setting Aside in Part, an Order of the National Labor Relations Board

Before: BONE, ORR and BARNES, Circuit Judges.

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated November 4, 1957. The Court heard argument of respective counsel on December 10, 1958, and on February 4, 1959, being fully advised in the premises, handed down its decision enforcing in part and setting aside in part the order of the Board. In conformity therewith, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Respondent, International Association of Machinists, Lodge 942, AFL-CIO, and its officers, representatives, agents, successors and assigns shall:

1. Cease and desist from:

(a) Restraining or coercing employees of Alloy Manufacturing Company in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, as amended, hereinafter called the Act, by picketing for the

purpose of obtaining recognition of Alloy's employees at a time when it does not represent a majority of them.

(b) Attempting, by picketing, to cause Alloy to discriminate against Alloy's employees in violation of Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Post in conspicuous places in the Respondent Union's business offices, meeting halls, and all places where notices to its members are customarily posted, copies of the notice attached hereto marked "Appendix." Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region of the National Labor Relations Board, Seattle, Washington, shall after being duly signed by official representatives of the Respondent Union, be posted by the Respondent immediately upon receipt thereof and be maintained by it for sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail signed copies of the notice attached hereto marked "Appendix" to the aforesaid Regional Director for posting, Alloy Manufacturing Company willing, at all locations where notices to the Company's employees are customarily posted. Copies of said notice to be furnished by the said Regional Director, shall, after being duly signed by authorized representatives of the Respondent, be forthwith returned to the Regional Director for such posting.

(c) Notify the aforesaid Regional Director, in writing, within ten (10) days from the date of this Decree, as to the steps the Respondent has taken to comply herewith.

It is FURTHER ORDERED, ADJUDGED, AND DECREED that order of the Board is set aside in so far as it prohibits

listing of Alloy on the "We Do Not Patronize" list and the importuning of customers not to patronize Alloy.

March 10, 1959

/s/ PAUL P. O'BRIEN
Paul P. O'Brien
Clerk

March 11, 1959

A True Copy

Attest: PAUL P. O'BRIEN
Clerk

(Seal)

APPENDIX

NOTICE

TO ALL MEMBERS OF INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE 942, AFL-CIO
PURSUANT TO

a decree of the United States Court of Appeals enforcing in part and setting aside in part an order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended we hereby give notice that:

> WE WILL NOT restrain or coerce the employees of ALLOY MANUFACTURING COMPANY, in the exercise of rights guaranteed in Section 7 of the Act, including specifically the right to refrain from engaging in any or all the activities guaranteed thereunder, by picketing for the purpose of obtaining recognition of ALLOY's employees at a time when it does not represent a majority of them.

WE WILL NOT, by picketing attempt to cause ALLOY to enter into an agreement with us containing union shop provisions, until such time as we are the lawfully constituted bargaining representative of ALLOY's employees.

INTERNATIONAL ASSOCIATION OF MACHINISTS,
LODGE 942, AFL-CIO

(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 865

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE 942, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–7a) is reported at 263 F. 2d 796. Its supplemental opinion, partially denying petitioner's motion for a stay of judgment pending application for certiorari (Pet. 8a–9a), is not yet officially reported. The decision and order of the Board (R. 18–53)[1] are reported at 119 N.L.R.B. 307.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1959 (Pet. 10a–13a). A petition for rehearing was denied on February 26, 1959. The peti-

[1] "R" references are to the transcript of record printed in the court below.

tion for a writ of certiorari was filed on April 24, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under Section 10(e) of the National Labor Relations Act, which provides that "No objection that has not been urged before the Board * * * shall be considered by the court," a court of appeals may decline to review an issue which, though passed on by the Board, was not contested before it by the respondent.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix.

STATEMENT

The Board's trial examiner found that petitioner Union, though it had lost a Board-conducted election by a vote of 6 to 0, nevertheless continued to picket the premises of the Alloy Manufacturing Company for the objectives of forcing Alloy to recognize it as the employees' exclusive bargaining agent and to grant it a contract which required employees to become union members. The examiner further found that the Union also sought to attain those objectives by placing Alloy's name on a "We Do Not Patronize" list, which was printed in a union newspaper, and by appeals to Alloy's customers not to buy its products. (R. 36–40.) The examiner concluded that, insofar as the picketing sought to compel recognition, it tended to restrain

Alloy's employees in their choice of a representative and was thus violative of Section 8(b)(1)(A) of the Act and that, insofar as it sought a union shop contract, it was an attempt to cause Alloy's employees to be discriminated against for their lack of union membership and was thus barred by Section 8(b)(2). (R. 41–43.) The examiner, however, found no violation of the Act with respect to the Union's use of the "We Do Not Patronize" list and its customer appeals, on the ground that these activities were noncoercive and thus protected by Section 8(c) (R. 44–47). He accordingly recommended that an appropriate remedial order be entered respecting the picketing, and that the complaint be dismissed respecting the "We Do Not Patronize" list and the customer appeals (R. 46–49).

The Union filed no exceptions with the Board from the trial examiner's findings and conclusions. The charging party, Alloy, excepted to his failure to find a violation with respect to the "We Do Not Patronize" list and the customer appeals (R. 15–17).

The Board affirmed the trial examiner's decision with respect to the picketing. The Board noted that the Union had filed no exceptions. It added that: (1) the trial examiner's conclusion that minority picketing for recognition was violative of Section 8(b)(1)(A) comported with the Board's recent decision in *Curtis Brothers,* 119 N.L.R.B. 232 (which is before this Court in No. 717); and (2) the logic of *Curtis* compelled the conclusion that, insofar as the picketing sought in addition a union shop, it was not only viola-

tive of Section 8(b)(2), but also of Section 8(b)(1)(A) (R. 19–20).

The Board then went on to hold, overruling the trial examiner, that the use of the "We Do Not Patronize" list and the customer appeals, in furtherance of the recognition and union-shop objectives, was likewise violative of the Act. For, as the Board pointed out (R. 22): "* * * appeals to consumers and 'we do not patronize' lists contain the same threats to the employees' livelihood as does picketing."

The court of appeals enforced the Board's order insofar as it prohibited the Union from picketing to compel recognition and a union shop. Since the Union conceded that its picketing for a union shop was violative of Section 8(b)(2), the portion of the order barring such picketing was sustained on that ground. The portion of the order barring picketing for recognition was sustained on the ground that, as the Union had failed to except to the trial examiner's finding that such picketing was violative of Section 8(b)(1)(A), Section 10(e) foreclosed court consideration of that question. (Pet. 3a–5a.)

The court, however, declined to enforce the remaining portion of the Board's order, barring the use of the "We Do Not Patronize" list and the customer appeals. In agreement with the trial examiner, the Court concluded that this activity was protected by Section 8(c). (Pet. 5a–7a.)

ARGUMENT

The first question which petitioner seeks to present (Pet. 2)—whether Section 8(b)(1)(A) of the Act

prohibits peaceful picketing by a minority union to compel recognition as the employees' exclusive bargaining agent—is the same question that is presented in No. 177, certiorari granted April 20, 1959 (the *Curtis* case). That question, however, was not reached by the court below because of its view that, since the Union had failed before the Board to contest the trial examiner's findings on the picketing, Section 10(e) warranted the court in declining to review the picketing question. Thus, the primary question which petitioner asks this Court to review was not considered or decided by the court below. If, as we believe to be clear, the action of the court below in declining to review that question does not present any grounds for certiorari, this Court would likewise have no basis for reaching the merits of the picketing issue. Nor would the Court have occasion to consider other questions here, for the Board has decided not to seek certiorari in the instant case with respect to the court of appeals' holding on the "We Do Not Patronize" list and the customer appeals.

The situation here, where the Board has elected to affirm on substantive grounds the trial examiner's findings even though no exceptions have been filed by the party aggrieved, is an unusual one. Section 10(c) of the Act provides that, if no exceptions to a trial examiner's report are filed within twenty days, his "recommended order shall become the order of the Board." Pursuant to this provision, the Board automatically adopts the trial examiner's order as its own and obtains summary enforcement thereof, where no exceptions at all have been filed to his intermediate

report.[2] Moreover, where, as here, exceptions have been filed to only a part of the trial examiner's findings, the Board ordinarily will not consider those to which no exceptions were filed, affirming them simply because of the absence of exceptions.[3] In these circumstances, the problem which confronted the court below—*i.e.*, whether Section 10(e) empowers a court to decline to consider an issue where no exceptions have been filed respecting it but the Board has nevertheless considered and affirmed the trial examiner's holding—is not likely to arise often, and its resolution has no intrinsic or general importance in the administration of the Act. For this reason alone, the petition should be denied.

Moreover, the court's application of Section 10(e) was a permissible one and within its powers under the Act. Where, as here, the issue has not been contested before the Board, the Board has not had the benefit of full argument of the issues by the parties, and the reviewing court, in turn, does not have the benefit of the Board's informed judgment on the contentions advanced for the first time on appeal. See *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 256; *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36–37; *Federal Power Com-*

[2] See *National Labor Relations Board* v. *Noroian*, 193 F. 2d 172 (C.A. 9); *National Labor Relations Board* v. *Pugh & Barr, Inc.*, 194 F. 2d 217 (C.A. 4).

[3] The cases cited by petitioner (Pet. 11, n. 2) present the unusual situation where the trial examiner's findings or recommendations were, in the Board's view, clearly erroneous; in this situation, the Board may modify or set aside the finding even though there has been no specific exception thereto.

mission v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498–501. In these circumstances, a court of appeals is justified in declining to review a portion of an order to which the party adversely affected filed no exceptions and which would, therefore, automatically have become final but for exceptions filed to other parts of the order by another party.[4]

[4] There is no merit to petitioner's contention (Pet. 14) that, even if Section 10(e) were applicable here, it would not have foreclosed judicial review under the exception recognized in *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388—*i.e.*, the court need not enforce a Board order, even absent exceptions, "if the Board has patently traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce." The Board's holding that Section 8(b)(1)(A) bars minority picketing for recognition is supported by substantial considerations (see Pet. No. 717, pp. 9–14). Consequently, even if the Board were ultimately reversed, it cannot be said that it "has patently traveled outside the orbit of its authority." In short, the exception envisaged by *Cheney* is not the situation where the agency arrives at a colorable conclusion which is later found to be erroneous, but rather one where it is clear that the agency exceeded its jurisdiction or has no basis whatever for its action. This interpretation is confirmed by *Tucker*, *supra*, where this Court held that even such a substantial defect as appointing a hearing examiner who did not satisfy the requirements of the Administrative Procedure Act was not enough to deprive "the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity." (344 U.S. at 38).

Nor can petitioner derive support from *Phillips* v. *Securities and Exchange Commission*, 156 F. 2d 606 (C.A. 2); *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741 (C.A. D.C.); and *Hormel* v. *Helvering*, 312 U.S. 552 (Pet. 13, 16–17). The issue in *Phillips* was whether a stockholder had reasonable grounds for failing to object to a reorganization plan, when the SEC undertook on its own to examine the plan; the case simply holds that, since the stockholder could have assumed that the

CONCLUSION

The procedural question on which the decision below was based—the only question properly urged as a reason for granting the writ—turns on the unusual circumstances of this case and is not of general importance. There is no conflict of decisions and the decision below is correct. The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

JEROME D. FENTON,
General Counsel,
THOMAS J. MCDERMOTT,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
NORTON J. COME,
Deputy Assistant General Counsel,
National Labor Relations Board.

MAY 1959.

Commission would have decided the issue in a favorable way, his initial failure to object did not bar him from contesting the Commission's subsequent adverse decision. In the *City of Pittsburgh* case, the court found that the question had in fact been timely raised in a petition for rehearing (237 F. 2d at 749). In *Hormel*, between the time the case was decided by the Board of Tax Appeals and its review in the court of appeals, this Court, in another case, had indicated the existence of a new basis for tax liability; in these special circumstances, it was held that the court of appeals could properly give consideration to the new decision even though it had not been considered below.

APPENDIX

The National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) provides:

Sec. 8. * * * (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; * * *

* * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

Sec. 10. * * * (c) * * * In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the

proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * *

(e) The Board shall have power to petition any United States court of appeals (including the United States Court of Appeals for the District of Columbia) or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States (including the United States District Court for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member,

agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE 942, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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IN THE

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OCTOBER TERM, 1958

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REPLY BRIEF FOR PETITIONER

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1. The primary purpose of this reply brief is to present an additional question. We realize that this is an unusual step but we believe that unusual circumstances exist which justify it.

The additional question we wish to present is as follows:

> Whether Section 8(b)(1)(A) of the National Labor Relations Act prohibits a union from having an employer placed on a "We Do Not Patronize" list and from appealing directly to customers not to trade with the employer in order to secure recognition of the union as the employees'

exclusive bargaining representative at a time when the union does not represent a majority of the employees within the appropriate unit.

While petitioner prevailed in the court below on this question, the court finding that the conduct was "within the general area of protection of the 1st amendment guarantying freedom of speech" (Pet. for Cert. p. 7a), petitioner nevertheless has standing to raise the question. 28 U.S.C. § 1254(1) provides that "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of *any* party to any civil or criminal case, before or after rendition of judgment or decree" (emphasis supplied). Since standing extends to *any* party, if is not limited to the party who did not prevail below. Especially would this appear to be true where, as here, petitioner prevailed in part and lost in part, and petitioner seeks to raise both the adverse and favorable parts of an interrelated determination. And it is to be observed that this additional question is presented within ninety days from the rendition of judgment.

In its opposition the Board states that it "has decided not to seek certiorari in the instant case with respect to the court of appeals' holding on the 'We Do Not Patronize' list and the customer appeals" (p. 5). Yet on April 2, 1959, more than three weeks before the instant petition was filed on April 24, 1959, the Board publicly announced that it does not acquiesce in the determination of the court below and will seek review by this Court. Thus it stated in *Louisville Cap Co.*, 123 NLRB No. 74, 43 LRRM 1475, 1477, n. 2, that:

> Drivers, Chauffeurs and Helpers Local 639 (Curtis Brothers) 119 NLRB 232, 41 LRRM 1025,

enforcement denied F. 2d , 43 LRRM 2156 (C.A.D.C.); International Association of Machinists (Alloy Manufacturing Company) 119 NLRB 307, 41 LRRM 1058, enforcement denied in part F. 2d (C.A. 9). We do not acquiesce in the opinion of the court of appeals in the Curtis Brothers case respecting the legality of recognitional picketing and of that of the court of appeals in Alloy Manufacturing Company case respecting the legality of a consumer appeals and a product boycott in a like situation to that presented here. With all due respect for the opinions of the courts in those cases, we do not adopt their conclusions until the Supreme Court has had an opportunity to rule on these issues.

Accordingly, while declining to acquiesce in the merits of the determination below until this Court "has had an opportunity to rule," the Board nevertheless declines to seek the review which it professes to await. And we understand that the decision not to cross-petition in this case does not rest upon an abandonment by the Board of the merits of its position.

There are presently three cases pending in the Courts of Appeals which present this additional question. Two are in the Court of Appeals for the District of Columbia Circuit, one in which the record has not yet been filed,[1] and the other[2] in which the Board is about to move the Court of Appeals to stay further proceeding pending this Court's decision in *National Labor Relations Board v. Drivers Local Union No. 639*, No.

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[1] *United Hatters, Cap & Millinery Workers Union* v. *National Labor Relations Board*, C.A.D.C. No. 15087 (*Louisville Cap Co.*, 123 NLRB No. 74, 43 LRRM 1475).

[2] *International Association of Machinists, Local Lodge No. 311, et al.* v. *National Labor Relations Board*, C.A.D.C. No. 14,818 (*Machinery Overhaul Co.*, 121 NLRB No. 153).

717, October Term 1958, the latter being the case which presents the picketing aspect of the question. Since the Court of Appeals has twice before, over objection, stayed proceedings in pending cases to await this Court's decision in *Drivers Local Union No. 639*,[3] there is every reason to suppose that it will continue to do the same. The third case is before the Court of Appeals for the Fourth Circuit,[4] and while it was argued on March 9, 1959, there is good reason to believe that the Fourth Circuit may withhold its decision pending this Court's decision in *Drivers Local Union No. 639*. Consequently, the instant case is the single one which presents the additional question and which is now ripe for review. And it is especially appropriate that this be the case in which the question is reviewed, for it is in this case that the Board first announced this aspect of its doctrine.

In *National Labor Relations Board* v. *Drivers Local Union No. 639*, No. 717, October Term 1958, this Court granted the writ to review the aspect of the question which pertains to picketing. The additional question we seek to present raises the aspect of the question which pertains to a "We Do Not Patronize" list and customers appeals. Thus the additional question presents the second branch of the same question upon which the writ has already been granted. The difference between the branches is that picketing, while it is speech, is also more than speech, whereas publica-

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[3] *Joint Council of Sportswear Workers* v. *National Labor Relations Board*, C.A.D.C. No. 14486 (*Haron and En Tour*, 120 NLRB 659); *Retail Store Employees Union, Local 1595* v. *National Labor Relations Board*, C.A.D.C. No. 14557 (*J. C. Penney Co.*, 120 NLRB 1535).

[4] *National Labor Relations Board* v. *United Rubber Workers*, C.A. 4 No. 7781 (*O'Sullivan Rubber Corp.*, 121 NLRB No. 185).

tion of a "We Do Not Patronize" list in a newspaper and asking customers in oral conversations not to trade with a nonunion firm constitute pure speech. Sound decision on both branches of the question would be enhanced were the Court to have before it at the same time the full sweep of the Board's pioneer interpretation of Section 8(b)(1)(A). And it goes without saying that the pure speech aspect of the question is important and recurring.

2. The Board seeks to avoid review of the action of the court below in declining to reach the merits of the picketing aspect of the question upon the basis of considerations which are dubious to say the least.

(a) The Board suggests that the court below exercised a "permissible" judgment in declining to reach the merits (p. 6). But the determination of the court below did not rest upon an exercise of discretion but was based on its view that it had no power to review the merits. For the court stated that, in the absence of exceptions by petitioner to the trial examiner's intermediate report, the merits of the question "cannot be entertained by us" (Pet. for Cert. p. 4a), and "leaves us no other choice than to sustain the order of the Board as far as it respects picketing" (*id.* at 5a).

(b) That the decision below could not rest upon an exercise of discretion is evident from the meritless reasons now assigned by the Board for the first time to justify such an exercise. The Board admits that it "elected to affirm on substantive grounds" despite the absence of exceptions (p. 5). But it suggests that it "has not had the benefit of full argument of the issues" and the reviewing court "does not have the benefit of the Board's informed judgment . . ." (p. 6). This is an extraordinary evaluation of the posture of this case.

The Board affirmed on the merits on the authority of its contemporaneous decision in *Curtis Brothers*, 119 NLRB 232, certiorari granted *sub. nom. National Labor Relations Board v. Drivers Local Union No. 639*, No. 717, October Term 1958. *Curtis* is a companion to this case and was decided four days before. The majority opinion in *Curtis* runs to fifteen pages (*id.* at 232-247), the concurring opinion to eight pages (*id.* at 248-256), the dissenting opinion to ten pages (*id.* at 256-265), and the intermediate report to eleven pages (*id.* at 266-267). The competing considerations could hardly have been more fully aired and exposed.

Nor was the court below without enlightenment. The Board's brief below, copies of which have been filed with this Court, devoted 26 pages to a full discussion of the question (pp. 15-41), and reproduced the majority, concurring, and dissenting opinions in *Curtis* in a 55 page appendix (pp. 49-104). Petitioner's brief below devoted 33 pages to the question (pp. 9-42), plus a three-page appendix (pp. 59-61). And in the course of oral argument the court below *sua sponte* granted counsel additional time.

It is fair to say that the merits of the issue could not have been more fully explored by the Board or in the court below.

(c) The Board suggests that the procedural question is unimportant. But the Board does (Pet. for Cert. p. 11 and n. 2), as its rules permit (*id.* at p. 11 and n. 1), decide the merits of a particular issue to which no exception is taken if the case is before it on any exceptions. It does so in important cases, as witness the instant case and *International Rice Milling Co., Inc.*, 84 NLRB 360, later decided by this Court, 341 U. S. 665. The question is therefore necessarily

recurrent. And since Section 10(e) finds its counterpart in numerous regulatory statutes, the question cuts across judicial review of administrative determinations generally.

Respectfully submitted,

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